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(Slip Opinion)

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

_____)	
In re:)	
)	
K.O. Manufacturing, Inc.)	EPCRA Appeal No. 93-1
)	
Docket No. EPCRA VII-89-T-611)	
_____)	

[Decided April 13, 1995]

FINAL DECISION

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

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K.O. MANUFACTURING, INC.

EPCRA Appeal No. 93-1

FINAL DECISION

Decided April 13, 1995

Syllabus

U.S. EPA Region VII filed a complaint against K.O. Manufacturing, Inc., alleging that it had violated Section 313 of the Emergency Planning and Community Right to Know Act ("EPCRA"), 42 U.S.C. § 11023, and 40 C.F.R. Part 372 by failing to file a toxic chemical release inventory reporting form ("Form R") for glycol ether compounds for calendar year 1987. In particular, the complaint alleged that: (1) K.O. is a facility subject to the reporting requirements of EPCRA § 313; (2) K.O. processed the chemical 2-Butoxyethanol, a glycol ether compound, in excess of 75,000 pounds; and (3) K.O. failed to file a Form R for glycol ether compounds for the calendar year 1987.

The lists of chemicals and chemical categories to which the reporting requirements apply are found at 40 C.F.R. § 372.65(a) - (c). This section is comprised of three lists (referred to in this opinion as the (a), (b), and (c) lists). The (a) and (b) lists enumerate specific chemicals by "CAS numbers," which are unique numeric identifiers assigned to individual chemicals by the Chemical Abstract Service, a private chemical indexing company. The third, or (c) list, consists of chemical categories for which reporting is required. These categories do not have CAS numbers.

In an accelerated decision dated February 28, 1993, the Presiding Officer concluded that K.O. was not liable for the alleged EPCRA violations and the complaint was therefore dismissed with prejudice. Specifically, the Presiding Officer agreed with K.O. that the regulations did not provide adequate notice that reporting of the chemical 2-Butoxyethanol was required. The Presiding Officer found K.O. could have reasonably concluded that because the CAS number lists purport to list those chemicals that must be report individually by name and CAS number, and because 2-Butoxyethanol has a CAS number but is not on either of these lists, reporting was not required. In other words, it was not unreasonable for K.O. to conclude that the only chemicals that must be reported under the chemical category list are those chemicals falling within a particular category that do not have assigned CAS numbers. This appeal followed.

Held: The regulations require reporting of individual chemicals appearing on the (a) and (b) lists as well as all chemical categories appearing on the (c) list. Both K.O. and the Presiding Officer, however, blur the critical distinction between reporting individual chemicals appearing on the (a) and (b) lists and reporting chemical categories appearing on the (c) list. They analyze the case as one in which K.O. is charged with failing to file a Form R for the chemical 2-Butoxyethanol, instead of failing to file a Form R for the glycol ether chemical category. As K.O. has conceded, the chemical 2-Butoxyethanol is a member of the glycol ether category. K.O. therefore had an obligation to file a Form R for this chemical category. The Board concludes that there is no merit to K.O.'s assertion that the reporting requirements are ambiguous in the present case.

Accordingly, the initial decision is reversed and this matter is remanded for further proceedings with regard to penalty.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

This matter arises under Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11001 *et seq.*, also known as the Emergency Planning and Community Right-To-Know Act of 1986 or EPCRA. The complainant, Director, Air and Toxics Division, U.S. EPA Region VII (the "Region"), joined by the Office of Enforcement, Toxics Litigation Division, appeals from an accelerated decision issued by Administrative Law Judge J. F. Greene ("Presiding Officer"). The Presiding Officer concluded that respondent, K.O. Manufacturing, Inc. ("K.O."), was not liable for violation of EPCRA § 313, 42 U.S.C. § 11023, and 40 C.F.R. § 372.30 of the implementing regulations. The complaint was therefore dismissed with prejudice. *See Decision and Order Granting Respondent's Motion for "Accelerated Decision" and Denying Complainant's Motion* ("Initial Decision").

The Presiding Officer's accelerated decision constitutes an initial decision of the Agency under 40 C.F.R. § 22.20(b). An initial decision may be appealed to the Environmental Appeals Board under 40 C.F.R. § 22.30. For the reasons set forth below, the Presiding Officer's decision is reversed.

I. BACKGROUND

Under EPCRA § 313(a) ¹ and 40 C.F.R. § 372.30, owners and operators of a facility subject to the requirements of EPCRA § 313(b) ³ are required to submit annually, no later than July 1 of each year, a Toxic Chemical Release Inventory Reporting Form ("Form R") for each toxic chemical listed under 40 C.F.R. § 372.65 that was manufactured, imported, processed, or otherwise used during the preceding calendar year in quantities exceeding established chemical thresholds. ⁴ Section 372.65 is comprised of three lists of chemicals and chemical categories to which the reporting requirements apply. The first two lists enumerate specific chemicals by "CAS numbers," which are unique numeric identifiers assigned to individual chemicals by the Chemical

¹ Section 313(a) states:

(a) Basic requirement

The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form as published under subsection (g) of this section for each toxic chemical listed under subsection (c) of this section that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity established by subsection (f) of this section during the preceding calendar year at such facility. Such form shall be submitted to the Administrator and to an official or officials of the State designated by the Governor on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.

EPCRA §313(a), 42 U.S.C. §11023(a).

² Section 372.30(a) states:

For each toxic chemical known by the owner or operator to be manufactured (including imported), processed, or otherwise used in excess of an applicable threshold quantity in §372.25 at its covered facility described in §372.22 for a calendar year, the owner or operator must submit to EPA and to the State in which the facility is located a completed EPA Form R (EPA Form 9350-1) in accordance with the instructions in Subpart E of this part.

³ EPCRA §313(b)(1)(A) states:

The requirements of this section shall apply to owners and operators of facilities that have 10 or more full-time employees and that are in Standard Industrial Classification Codes 20 through 39 (as in effect on July 1, 1985) and that manufactured, processed, or otherwise used a toxic chemical listed under subsection (c) of this section in excess of the quantity of that toxic chemical established under subsection (f) of this section during the calendar year for which a release form is required under this section.

⁴ The threshold quantity for calendar year 1987 was 75,000 pounds. EPCRA § 313(f)(1)(B); 40 C.F.R. § 372.25(a).

Abstract Service, a private chemical indexing company. The third list consists of chemical categories and does not employ CAS numbers. Section 372.65 begins with the following narrative overview of the three listings in the regulation:

The requirements of this part apply to the following chemicals and chemical categories. This section contains three listings. Paragraph (a) of this section is an alphabetical order listing of those chemicals that have an associated Chemical Abstract Service (CAS) Registry number. Paragraph (b) of this section contains a CAS number order list of the same chemicals listed in paragraph (a) of this section. Paragraph (c) of this section contains the chemical categories for which reporting is required. These chemical categories are listed in alphabetical order and do not have CAS numbers.

40 C.F.R. § 372.65. The balance of section 372.65 contains the actual lists described in the overview: They are paragraphs (a) and (b), which are two long lists (hereafter the "CAS number lists" or the "(a) and (b) lists") of individual chemicals and corresponding CAS numbers, each containing identical information except for the manner in which it is arranged for cross-referencing purposes; and paragraph (c), which is a single short list of chemical categories (hereafter the "category list" or "(c) list"). There are over 300 individual chemicals listed in the CAS number lists and 20 chemical categories enumerated in the category list. The categories embrace some but not all of the chemicals in the CAS number lists.

On April 17, 1990, Region VII filed a one count complaint charging that K.O. had failed to make a timely submission of a Form R for the glycol ether category, in violation of EPCRA § 313 and 40 C.F.R. Part 372. Glycol ethers are one of the chemical categories appearing in the category list. The complaint alleged that: (1) K.O. is a facility subject to the reporting requirements of EPCRA § 313; (2) K.O. processed the chemical 2-Butoxyethanol, a glycol ether compound, in excess of 75,000 pounds; (3) glycol ether compounds are toxic chemicals listed under section 313(c) of EPCRA and 40 C.F.R. § 372.65; and (4) K.O. failed to file a Form R by July 1, 1988, for glycol ether compounds processed during calendar year 1987. The Region sought a penalty of \$5,000.

In its answer, dated June 5, 1990, K.O. admitted that it did not submit a Form R for glycol ether compounds, but denied that it had any legal obligation under EPCRA or its implementing regulations to file a Form R for 2-Butoxyethanol by the July 1, 1988 deadline. K.O. further denied that its failure

to submit a Form R for 2-Butyoxyethanol by the required date violated either the statute or the regulations. Thereafter, each party moved for an accelerated decision under 40 C.F.R. § 22.20,⁵ with the sole issue concerning the application of the reporting requirements to K.O. Each asserted that the other's reading of the reporting requirements rendered portions of those requirements meaningless.

In its motion for accelerated decision, K.O. asserted that it was not required to report its processing of the chemical 2-Butyoxyethanol, which has a CAS number and belongs to the glycol ether family of chemicals identified on the category list, but, importantly, is not listed on the CAS number lists. *See* Memorandum in Support of Respondent's Motion for Accelerated Decision and in Opposition to Complainant's Motion for Partial Accelerated Decision ("K.O. Motion"). Under K.O.'s reading of the regulation, a chemical not appearing on the CAS number lists would only require reporting pursuant to the category list if the chemical did not also have a CAS registry number. Thus, since 2-Butyoxyethanol has a CAS number⁶ (111-76-2) and does not appear on the CAS number lists, K.O. contends that it did not have to file a Form R for 2-Butyoxyethanol even though the chemical belongs to a chemical category (glycol ethers) appearing on the category list. K.O. reasons that the category list makes little sense if it is read to include chemicals, such as 2-Butyoxyethanol, which have CAS numbers and therefore could have been, but were not, listed in the CAS number lists. It illustrates this point by comparing 2-Butyoxyethanol to 2-Methoxyethanol and 2-Ethoxyethanol, which are also members of the glycol ether chemical family and which also have their own CAS numbers, but which, unlike 2-Butyoxyethanol, are specifically listed in the CAS number lists. K.O. asks rhetorically, "what is the purpose of listing an all-inclusive chemical category such as glycol ethers in paragraph (c) and specifically listing in paragraphs (a) and (b) some members of the same chemical category, while failing to list at all a

⁵ Section 22.20(a) states, in part:

The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the preceding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding.

40 C.F.R. §22.20(a). Region VII filed a motion for partial accelerated decision as to liability only on March 20, 1991. K.O. filed its motion for accelerated decision on April 5, 1991. Both parties filed replies to the motions.

⁶ Stipulations (filed January 24, 1991).

member [2-Butyoxyethanol] of the same chemical category having a CAS number?" K.O. Motion, at 6. In answer, K.O. asserts that "[t]here is no explanation other than to signify to the reader that the only chemicals sought to be included under the [paragraph (c)] chemical categories were those not having CAS numbers." *Id.* To round out this line of argument, K.O. cites 2-Ethylbutylglycol and 2-Ethylbutyl Acetate as examples of glycol ethers, which, unlike 2-Butyoxyethanol, do not have CAS numbers.⁷ See K.O. Motion at 6. According to K.O., these are the kinds of chemicals that are logically subject to the reporting requirement by chemical category, not 2-Butyoxyethanol.

K.O. further argued in its motion for accelerated decision that the Region's interpretation of section 372.65 renders the chemical specific listings in the CAS number lists meaningless. That is, because "glycol ethers" represent a category under the category list, there is no reason for reporting those glycol ethers listed individually in the CAS number lists, i.e., "all one would need is the chemical category listing of paragraph (c)." *Id.* at 7-8.

K.O. also claimed in its motion that the Agency itself expressed confusion over whether reporting was required for calendar year 1987. *Id.* at 5. According to K.O., one of K.O.'s representatives contacted EPA on September 29, 1989, to determine whether K.O. was required to file a Form R for 2-Butyoxyethanol for 1987, but was unable to obtain a clear answer. See Affidavit of John Cunningham, dated April 4, 1991 (Attachment 5 to K.O. Motion). K.O. also states that it was advised by its supplier that reporting was not required. K.O. Motion, at 5.

In the Region's motion for partial accelerated decision, the Region argued that the regulations clearly require reporting of all listed chemicals *and* chemical categories, and that K.O. simply misread section 372.65 of the regulations. According to the Region, it is K.O.'s interpretation that would cause a regulatory requirement to become meaningless. That is, because the majority of chemicals falling within the chemical categories listed in paragraph (c) have CAS numbers, little or no purpose would be served by having the category list, because under K.O.'s interpretation, chemicals belonging to the listed categories would only have to be reported if they also appear in the CAS number lists. According to the Region, this result would render the category list meaningless,

⁷ This assertion by K.O. was not challenged by the Region. The Presiding Officer also specifically found that "there are glycol ethers that do not have CAS numbers * * *." Initial Decision, at 8. The Region has not challenged that finding.

since the list would only apply to a very small number of chemicals, i.e., those that do not have CAS numbers. Complainant's Motion for Partial Accelerated Decision ("Complainant's Motion"), at 7-8.

The Presiding Officer rejected the Region's position and concluded that K.O. was not liable for failing to file a Form R for 2-Butoxyethanol because, as the Presiding Officer also concluded, section 372.65 did not provide adequate notice that reporting was required. *See* Initial Decision at 1, 11. The Presiding Officer found that K.O. could have reasonably concluded that because the CAS number lists purport to list those chemicals that must be reported individually, and because 2-Butoxyethanol was not on either of these lists, reporting was not required. For example, where the narrative overview of section 372.65 says that "[p]aragraph (a) of this section is an alphabetical order listing of those chemicals that have an associated Chemical Abstract Service (CAS) Registry number," the Presiding Officer concluded that it was not unreasonable for K.O. to construe this language as meaning that there is no reporting obligation for chemicals whose CAS numbers do not appear on the listing. In other words, according to the Presiding Officer, it is reasonable to read the quoted language as describing the location in section 372.65 where one will find a list of all reportable chemicals that have CAS numbers. Other reportable chemicals not having CAS numbers may be found in the category list, which lists chemicals that fall into reportable chemical categories that, as stated in the narrative overview of section 372.65, "do not have CAS numbers." The Presiding Officer observed further that,

Respondent was fortified in its reading by the presence in the paragraph (a) and (b) listings of other glycol ethers which have CAS numbers. It is clear, too, why respondent concluded that the chemical categories listing [paragraph (c) of section 372.65] was intended to cover chemicals that did not have CAS numbers but were to be reported. Such chemicals obviously could not be listed in paragraphs (a) and (b). Since there are glycol ethers that do not have CAS numbers, and would be covered by paragraph (c), the appearance of "glycol ethers" in the "categories" list does not create an ambiguity or a warning that respondent was, in EPA's view, on the wrong track. The evidence in complainant's pretrial exchange indicates that respondent had arrived at its interpretation contemporaneously, not simply in defense to the complaint. Further, although reliance of a respondent upon its chemicals supplier's opinion of the meaning of a regulation would seldom be considered helpful to a defense, in these circumstances the

supplier's view that 2-Butyoxxyethanol did not have to be reported simply suggests that other readers could read section 372.65(a), (b), and (c) (as well as certain other materials published by way of explanation and guidance) in the same way as did respondent.

Decision and Order at 8-9 (brackets in original, footnotes omitted). This appeal followed.

II. DISCUSSION

There are two points the Region, joined by the Office of Enforcement, Toxics Litigation Division, urges upon us on appeal. First, it asserts that the Presiding Officer did not apply the correct standard of review to EPA's interpretation of the reporting requirements. According to the Region, the Presiding Officer was obligated to follow the Region's interpretation unless the interpretation was arbitrary and capricious or contrary to law. Thus, according to the Region, its interpretation is entitled to substantial deference where it construes a regulation on a matter within its jurisdiction. Had the Presiding Officer applied this deferential standard of review, the Region argues that its interpretation would be upheld and K.O. would have been found liable for failure to report under section 313 of EPCRA.

Second, the Region argues that the Presiding Officer reached an incorrect legal conclusion as to whether K.O. had adequate notice of its reporting obligation under section 313 of the Act. The Region believes that, taken together, the preambles to the proposed and final rule, the rule itself (proposed and final), and the 1987 Instructions for Form R provide sufficient notice to K.O. of its reporting obligation for processing a glycol ether compound. Because K.O. had lawful notice of these matters by reason of their publication in the Federal Register, the Region concludes that K.O. may not avoid their legal import nor excuse itself from liability by claiming that it was given inconsistent or wrong advice from its supplier or EPA.

A.

Returning to the first point, the Region cites familiar authorities for the proposition that a reviewing tribunal (referring specifically to Article III courts) should defer to an administrative agency's interpretation of its regulations unless the interpretation is unreasonable. *E.g.*, *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)

(the agency's interpretation "is of controlling weight unless it is plainly erroneous or inconsistent with the regulation"). The Region also notes that this standard of deferential review has been adopted by EPA's administrative law judges in several instances. *E.g.*, *T H Agriculture and Nutrition Co.*, TSCA VII-83-T-19, at 7-8 (1984); *Southern Mill Creek Products, Inc.*, I.F. & R. Docket Nos. 88486 and 88575 (1975); *Bradley Exterminating Co.*, I.F. & R. Docket No. V-604-C (1980). Thus, where two equally reasonable interpretations are available, it has been held by the Presiding Officer that the Agency's interpretation deserves deference. *Bradley Exterminating Co.*, at 35. The Region concludes from these authorities that the deferential standard of review must be followed by a Presiding Officer unless the interpretation the Region advances is "clearly wrong." Region's Appellate Brief, at 6.

Applying this analysis to the case before us, the Region argues that the Presiding Officer veered from the correct standard of review by adopting a standard that appears to allow a person to choose his or her own interpretation of a regulation, and, quoting the Presiding Officer, if it "does not render any portion of the regulation superfluous or meaningless," that person should be relieved from liability for violating the regulation. The specific words of the Presiding Officer that caused the Region to settle on this line of attack are as follows:

Where respondent's construction of a regulation differs from complainant's, and does not render any portion of the regulation superfluous or meaningless, respondent may not be held liable for failing to know what construction the enforcing authority places upon the regulation. This is particularly true where, as here, the wording of the regulation on its face equally if not more probably supports respondent's construction over complainant's, and where respondent relied contemporaneously upon its own interpretation.

Initial Decision, at 1.

Were these words the actual basis for the Presiding Officer's holding, the Board would probably find itself in agreement with the Region on this aspect of its appeal. The problem, however, is that these words appear, not in the body of the Presiding Officer's decision, but in the headnotes preceding the decision. Thus, in our opinion, they are not part of the decision and should not be regarded as such. Moreover they do not capture the true basis of the Presiding Officer's analysis of the case. They represent no more, we suspect, than a hurried attempt at simplification gone awry. The actual text of the decision appears to focus on

whether K.O. had adequate notice of the reporting requirement, rather than on rejecting the Region's construction of the requirement. The Presiding Officer resolved the case by concluding that the Agency, despite its regulations, preambles, forms and instructions, had not given K.O. sufficient notice of the duty to report 2-Butyoxxyethanol on Form R. In arriving at this conclusion, the Presiding Officer did not hold that the Region's interpretation of the law was necessarily incorrect or unworthy of deference; rather, the Presiding Officer merely concluded that whatever the reporting requirement, K.O. did not have fair notice of the Region's version of that requirement. Thus, the amount of deference, if any, to be accorded the Region's interpretation of the reporting requirements is not really an issue in this case. Therefore, we do not rely on the Region's deference argument as a basis for our decision.

B.

The Region's second line of attack, as noted above, is to argue that the Presiding Officer reached an incorrect legal conclusion as to whether K.O. had adequate notice of its reporting obligation under section 313 of the Act. In its brief on appeal, the Region makes essentially the same arguments it made to the Presiding Officer, who rejected them for the reasons related above. The Region argues that the final rule and the 1987 Instructions for Form R provided K.O. with adequate notice of the meaning of the requirement. The Region also cites the preambles to the proposed and final rule as additional sources of notice to K.O. Taken together, the Region asserts that these materials provide K.O. with ample notice of the reporting requirements. We agree with the Region on this issue.

As a threshold matter, it is important to understand that the complaint filed by the Region did not charge K.O. with failing to report 2-Butyoxxyethanol on Form R. Rather, the precise charge that was brought against K.O. was a failure "to submit Form R for glycol ether compounds" by the requisite date, July 1, 1988. Complaint at 2 (Count I, para. 13-14). K.O.'s processing of *any* glycol ether compound could have given rise to this particular charge; in this instance, it is 2-Butyoxxyethanol that provides the germ of the reporting violation. *Id.* (Count I, para. 11). The important distinction to note here is that failing to report a specific chemical is a separate matter from failing to report a chemical category. K.O. is charged with the latter, not the former. This distinction comes about by virtue of the separate lists in section 372.65: the (a) and (b) lists are for individual chemicals and the (c) list is for chemical categories. Form R requires reporting of both chemicals and chemical categories, depending on the particular list where they appear. As explained below, a chemical such as 2-Butyoxxyethanol, which does not appear individually in any of the lists, is nevertheless a member of a

chemical category appearing on the (c) list. Thus, it is the chemical category, rather than the individual chemical, that is reportable on Form R.

Both K.O. and the Presiding Officer blur this critical distinction by repeatedly referring to the cause of action against K.O. as one in which K.O. is being charged with failing to file a Form R for 2-Butoxyethanol (rather than being charged with failing to file a Form R for a chemical category). They then assert that the charge is unfair because K.O. was not given adequate notice of an obligation to report 2-Butoxyethanol. The paradigm of this blurring is where the Presiding Officer expressly concludes *as a matter of law* that "Respondent [K.O.] is not liable for its failure to file a Form R for 2-Butoxyethanol for calendar year 1987 by July 1, 1988." Initial Decision at 18 (paragraph 8 under the heading "Findings of Fact and Conclusions of Law"). Similarly, in K.O.'s answer to the complaint, where it responds to the allegation that *glycol ether compounds* are reportable toxic chemicals, K.O. states that it "affirmatively denies that Section 313(c) of EPCRA and 40 C.F.R. § 372.65 require reporting of 2-Butoxyethanol." Answer at para. 11.

The Presiding Officer's conclusion and K.O.'s answer to the complaint are completely beside the point and should not have been the basis on which the case was decided, for K.O. was never charged with failing to report 2-Butoxyethanol on Form R; nor could it have been charged with such a violation in view of the fact that 2-Butoxyethanol is neither an individual chemical on the (a) and (b) lists nor a chemical category on the (c) list. The chemical 2-Butoxyethanol is, however, a member of a chemical category; specifically, it belongs to the glycol ether chemical category, which is a reportable category on the (c) list.⁸ The production of the chemical gives rise to a reporting obligation for the chemical category, but not for the chemical itself. This is clear from the language of the regulations and from the information requested on Form R, as explained below.

As for the notice afforded by the regulations, section 372.30 expressly requires the reporting on Form R of each "toxic chemical" known by the owner or operator to be manufactured, processed, or otherwise used in excess of a prescribed threshold quantity. The term "toxic chemical" is defined in section 372.3 as "a chemical or chemical category listed in § 372.65." The latter section, as previously detailed, sets forth the three lists, including the (c) list that identifies

⁸ K.O. has conceded that 2-Butoxyethanol is a glycol ether compound. Answer at para. 11.

glycol ethers as one of the reportable "toxic chemicals." Since 2-Butoxyethanol does not appear on the (a) and (b) lists, but it belongs to a chemical category on the (c) list, K.O. had a clear obligation to report that category on Form R. Hence the complaint filed against K.O. properly referred to the chemical category as the basis for the violation; it did not refer to the chemical itself as the basis for the reporting violation.

As for the amount of notice afforded by Form R, the reporting obligation is equally clear and is consistent with the regulation. The Presiding Officer and K.O. make much of the fact that there is a line on Form R that requires the filer to fill in the CAS number or mark it "N/A." The Presiding Officer viewed this instruction as confusing because it is counterintuitive to fill in "N/A" for 2-Butoxyethanol when the chemical in fact has a CAS number. The instructions clearly state, however, under the heading "*CAS Registry Number*," that this line is for CAS numbers that appear in Table III (a compilation of the three lists in section 372.65). See *Toxic Chemical Release Inventory Reporting Form R and Instructions*, at 11 (paragraph 1.2) (hereinafter 1988 Instructions), Office of Toxic Substances, March 1988 (EPA 560/4-88-005). The CAS number for 2-Butoxyethanol does not appear in Table III, as K.O. itself must concede. In that event, according to the instructions, "[i]f you are reporting one of the chemical categories in Table III(c)," the filer is to "enter [N/A] in the CAS number space." *Id.* This is not confusing, notwithstanding K.O.'s assertions to the contrary. K.O. would write N/A in this space, reflecting the fact that the CAS number for its chemical does not appear in Table III. The next line on the form is for "Chemical or Chemical Category Name." *Id.* (paragraph 1.3). The instructions there state, "You must enter in the space provided the name of the chemical or chemical category as it is listed in Table III." Since 2-Butoxyethanol does not appear in Table III but the chemical category "glycol ether" does, K.O. would write in glycol ether in the space provided. In other words, K.O.'s duty to report the glycol ether chemical category on Form R is clear. As the preamble to the proposed rule and the instructions accompanying the final rule make clear, this is true even where the individual chemical triggering the reporting obligation has a CAS number but is not listed individually on the (a) or (b) lists. In particular, the preamble to the proposed rule states:

A chemical that fits the definition of one of the listed categories and is not specifically listed in §372.45(a) and (b) [now section 372.65] would be reported using the category name. For example, a company using copper chloride, which is a chemical not specifically listed, would enter "Copper compounds" as the chemical identification.

52 Fed. Reg. 21,160 (June 4, 1987). Copper chloride has a CAS number but is not on the (a) or (b) lists. *See* Notice of Appeal at 13 n.9. Similarly, the instructions accompanying the final rule state, in part:

If you are reporting a chemical *category* listed in section 372.65(c) of the reporting rule rather than a specific chemical, you must combine the release data for all chemicals in the listed chemical category (e.g., all glycol ethers or all chlorophenols) and report the aggregate amount for that chemical category. Do not report releases of each individual chemical in that category separately. For example, if your facility releases 3,000 pounds per year of 2-chlorophenol, 4,000 pounds per year of 3-chlorophenol, and 4,000 pounds per year of 4-chlorophenol, you should report that your facility releases 11,000 pounds per year of chlorophenols.

53 Fed. Reg. 4,550 (Feb. 16, 1988) (emphasis in original). The chemicals 2-chlorophenol, 3-chlorophenol, and 4-chlorophenol, like 2-Butoxyethanol, have CAS numbers but are not specifically listed in the (a) or (b) lists. *See* Notice of Appeal at 12. Thus, upon consideration of the foregoing, we find no basis for confusion over the reporting obligation. Any confusion arises solely from K.O.'s attempt to blur the otherwise clear distinction between the reporting of individual chemicals versus chemical categories. As defined in the regulations, each is considered a toxic chemical and therefore each is separately reportable on Form R. This point is perhaps best illustrated by the fact that Form R does not require a person filing for a chemical category to specify the individual chemical or chemicals that give rise to the filing requirement; the form merely requires the reporting entity to supply the name of the category. *See* 1988 Instructions at 11; 52 Fed. Reg. 21,160 (June 4, 1987).

The various individual arguments that K.O. makes in support of its position, and the adoption of those arguments by the ALJ, fall largely to the side once it is understood that they are premised on the false notion that K.O. was charged with a failure to file a Form R for 2-Butoxyethanol. Whatever arguments one might make against such a charge are not relevant to this case, for K.O. was charged with an entirely different matter, i.e., a failure to file Form R for glycol ether compounds. Complaint at 2 (Count I, para. 14). This may be illustrated by the central argument made by K.O. in its motion for an accelerated decision, which the Presiding Officer granted. K.O. contends that the application of the facts of the case, combined with the plain language of section 372.65, compels the conclusion that it had no reporting obligation by reason of its

processing of 2-Butyoxyethanol. K.O.'s reasoning, however, reveals the flaw described above. K.O. states as follows:

The regulation plainly states that "Paragraph (a) of this section is an alphabetical order listing of those chemicals that have an associated Chemical Abstract Service ("CAS") Registry number." EB [2-Butyoxyethanol] has a CAS number. It is admitted [by the Region] that EB is not listed under paragraph (a). The regulation goes on to say that "Paragraph (b) of this section contains a CAS number order list of the same chemicals listed in paragraph (a) of this section." Again, it is admitted that EB had a CAS number and that it was not listed under paragraph (b). *The regulation by its express terms did not apply to EB.* There is no ambiguity requiring agency interpretation.

K.O. Motion at 2 (emphasis added). By thus focussing on the language of the regulation that refers to the reporting obligation for individual chemicals, K.O. conveniently overlooks the remainder of the regulation, which states that "Paragraph (c) of this section contains the *chemical categories* for which reporting is required." (Emphasis added.) As noted previously, K.O. does not dispute the fact that 2-Butyoxyethanol is a legitimate member of the glycol ether category; it merely denies that there is an obligation to report 2-Butyoxyethanol under section 372.65, which, of course, is not a denial that is relevant to the complaint filed against it. *Compare* Complaint at paras. 11 & 12 with Answer at paras. 11 & 12. Had it not ignored the clear distinction between reportable chemicals and reportable categories, it would have seen that its reporting obligation arose from the (c) list. This latter provision is not ambiguous, either by itself or when read in conjunction with the first part of section 372.65; and, also, the distinction between reportable chemicals and reportable categories is not an ambiguous distinction. By ignoring the distinction, and concentrating on the first part of section 372.65, K.O. has sought to introduce ambiguity where none legitimately exists.⁹ For that reason, we find no merit to K.O.'s arguments, either

⁹ To the extent that K.O. is arguing for a construction of the term chemical category which only includes chemicals that have no CAS numbers, that argument is premised on K.O.'s assertion that the reporting obligation is unclear or ambiguous, which in turn is premised on K.O.'s rather obvious mistake at blurring the distinction between reportable chemicals and reportable categories. Because, as demonstrated above, there is no legitimate basis for ignoring the critical distinction between chemicals and categories, it follows that K.O.'s contention that the meaning of the term

(continued...)

on appeal or as they were made in support of its motion for an accelerated decision.

One other matter warrants brief mention. K.O. points out that some glycol ethers with CAS numbers are listed on the (a) and (b) lists whereas 2-Butoxyethanol has a CAS number but is not listed on either list. K.O. argues that the (c) list should be read as only requiring the reporting of chemicals that do not have CAS numbers. K.O. reasons that the omission of 2-Butoxyethanol from the first two lists signifies that EPA does not intend to seek information on the processing of 2-Butoxyethanol, since the agency could have easily listed the chemical on the (a) and (b) lists. There are two flaws to this reasoning. First, as should be clear from the discussion above, the reporting obligation is clear and free from legitimate ambiguity. In such circumstances there is no valid basis for looking behind the plain meaning of the reporting obligation to determine EPA's intentions in omitting 2-Butoxyethanol from the CAS number lists. Here, in the instant case, EPA has made an unambiguous request for information on the processing of the glycol ether category. K.O. had an equally unambiguous duty to report it. Second, even if it were permissible to examine EPA's intentions in the present circumstances, the fact that the individual chemical, 2-Butoxyethanol, does not appear on the CAS number list (or, for that matter, on the (c) list) says nothing about whether EPA is also seeking information about the category to which 2-Butoxyethanol belongs. EPA can obviously make use of this information in combination with the information obtained from the individual glycol ethers reported on the CAS number lists, and thereby gain a more complete picture of glycol ether production in the United States than it could if K.O.'s interpretation of the reporting requirements were accepted.

III. CONCLUSION

Because the pertinent factual allegations of the complaint are not in dispute, and because we find that the decision to dismiss the complaint was based on an error of law, we hereby find that K.O. violated the Form R reporting requirements as alleged in the complaint. K.O. had adequate notice of its obligation to report its processing of glycol ether compounds listed in 40 C.F.R. §372.65(c). Accordingly, the Presiding Officer's *Decision and Order Granting Respondent's Motion for "Accelerated Decision" and Denying Complainant's*

⁹(...continued)

chemical category is unclear or ambiguous is also without any support.

Motion is reversed, and the matter is remanded for further proceedings with regard to penalty.

So ordered.